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TO: Interested Parties

FROM: Daniel Zingale, Director

DATE: September 22, 2000

RE: Implementation of AB 88 (Mental Health Parity): Guidance for Coordinating Mental Health Benefits for Employer Groups

This advisory provides guidance regarding implementation of AB 88 by full service health plans under circumstances in which an employer contracts directly with a behavioral health plan for the provision of the mental health services identified in AB 88<sup>1</sup> ("AB 88 Services").

Under AB 88, full service health plans are obligated to provide coverage for mental health services in parity with physical health benefits; however, employers contracting directly with behavioral health plans wish to avoid receiving duplicate coverage from full service health plans for these services. The Department has been asked to provide guidance as to how full service health plans may comply with AB 88 requirements in these situations. This advisory:

- (1) identifies the context in which these AB 88 compliance issues arise;
- (2) identifies models for compliance; and
- (3) describes compliance issues to be addressed and supporting exhibits to be provided in amendments seeking the Department's approval of proposed implementation arrangements between plans (see Attachment A).

## **BACKGROUND & CONTEXT**

The Department's objectives are (1) to fulfill its charge of monitoring health plan compliance with the Knox-Keene Health Care Service Plan Act of 1975, as amended (the "Act")<sup>2</sup> and enforcing compliance as necessary to protect California consumers, and (2) to facilitate health plan licensure and regulatory compliance in a manner consistent with the Department's consumer protection objectives.

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<sup>1</sup> AB 88 adds Section 1374.72 to the Knox-Keene Health Care Service Plan Act, requiring full service health care service plans to provide coverage for severe mental illness in persons of any age and serious emotional disturbances of children on parity with other medical benefits covered by the plan.

<sup>2</sup> California Health and Safety Code section 1340 et seq. References to "Section" are to sections of the Act. References to "Rule" are to the regulations promulgated pursuant to the Act at Title 10 of the California Code of Regulations.

A number of interested parties, including full service health plans ("FS Plans"), specialized behavioral health plans ("SBH Plans"), employer groups ("Employers"), Taft-Hartley trust plans and consumer organizations have requested the Department's guidance in resolving an issue of concern relating to application of AB 88. These parties have described circumstances in which Employers contract directly with an SBH Plan and wish to continue such direct relationship, including for the provision of AB 88 Services. The Employers wish to protect their choice of SBH Plan and do not want to duplicate the provision of AB 88 Services by FS Plans.

FS Plans have indicated their willingness to accommodate the concerns of Employers by placing on willing SBH Plans the responsibility for primary coverage of AB 88 Services. SBH Plans have stated a desire to assume primary responsibility for the provision of AB 88 Services to Employers in the context of the requirements of AB 88.

The parties seek a resolution that would (1) enable the FS Plan to demonstrate compliance with AB 88 with respect to these subscriber groups, (2) allow for the provision of AB 88 Services by the SBH Plan and not the FS Plan, and (3) not burden the Employer with duplicate coverage for AB 88 Services or increased administrative activity by its contracting plans. The Department developed the models outlined in this advisory with these objectives in mind and believes, based on representation by FS Plans, that they should result in nominal, if any, increases in administrative activity.

**Legislative Intent.** Clarification of the legislative intent underlying AB 88 is provided in a letter dated August 22, 2000, from Assemblywoman Helen Thompson and Senator Don Perata to the Chief Clerk of the Assembly. In the letter, the authors of AB 88 identify the legislative intent underlying AB 88, stating:

AB 88 is not intended to require any change in the contracting options or decisions of employers or other entities that contract directly with specialty carve out companies for employee health or mental health benefits that are equal to or exceed the level of benefits that are required in AB 88. Likewise, AB 88 is not intended to interfere with employee welfare benefit plans established pursuant to and in accordance with Section 302 of the Taft-Hartley Act, that are providing better than or equivalent benefits mandated by AB 88 through separate specialized health care service or mental health plans. Also, there are no provisions in AB 88 to authorize insurance providers to charge employers twice for equitable mental health benefits. Such practices would violate the intent of the law.

This clarification of legislative intent demonstrates that AB 88 was not intended to proscribe alternative models for contractual relationships between FS Plans and SBH Plans that provide enrollees with the intended coverage for AB 88 Services in a manner consistent with the requirements of the Act.

## MODELS FOR COMPLIANCE

The Department has identified two models which may allow FS Plans to comply with AB 88 in situations where Employers wish to directly contract with SBH Plans for the provision of AB 88 services. The models do not waive the obligation of the FS Plan to comply with AB 88. They instead offer alternative arrangements into which willing FS Plans and, in some cases, SBH Plans may enter to avoid duplication of benefits coverage and increased premiums to their Employer subscribers.

The two models identified by the Department are not intended to limit the options available to FS Plans to comply with AB 88 in a circumstance when employers directly contract for AB 88 Services. Health plans and other interested parties are invited to offer suggestions for other models for compliance for the Department's consideration.

### **Partnership Model**

One model for compliance identified by the Department is the "Partnership Model" in which the FS Plan and the SBH Plan become partners in coordinating the provision of AB 88 Services. Under the partnership model, the FS Plan and the SBH Plan become "partners" pursuant to a written contract ("Partnership Contract") that contains terms "coordinating" their respective benefits and identifying the extent of authority for oversight sufficient to demonstrate compliance with the Knox-Keene Act. Notwithstanding the Partnership Contract, pursuant to AB 88, the FS plan is obligated to provide coverage for AB 88 Services and will retain ultimate responsibility for providing those services in the absence of performance by the SBH Plan.

**Elements of the Partnership Contract.** At a minimum, the Partnership Contract should address the following issues to the extent necessary based on the particular circumstances that may be presented in each case:

- ◆ In order to demonstrate that the Employer will receive coverage for AB 88 Services in the absence of the SBH Plan's affirmative provision of those services, the FS Plan must demonstrate that it has a legally sufficient basis on which to enforce performance by the SBH Plan. Therefore, the Partnership Contract should contain terms sufficient to obligate the SBH Plan to provide primary coverage of AB 88 Services, with the FS Plan to provide secondary or supplemental coverage. The FS Plan must also demonstrate that, in the absence of performance by the SBH Plan, the FS Plan will provide coverage of AB 88 Services.
- ◆ To the extent that the SBH Plan is a Knox-Keene licensee, independently obligated pursuant to its licensure to meet the requirements of the Act, there is no requirement for the FS Plan to monitor or oversee the quality assurance, utilization management or grievance review processes of the SBH Plan. However, AB 88 requires that AB 88 Services be delivered in parity with the terms and conditions of the FS Plan's non-AB 88 Services. Therefore, the Partnership Contract must contain terms sufficient to obligate the SBH Plan to deliver services in parity with the FS Plan benefits and to give the FS Plan authority to monitor and oversee the parity of AB 88 Services delivered by the SBH Plan. This monitoring arrangement may be accomplished through periodic reporting by the SBH Plan to the FS Plan of the covered benefits.

The stakeholders have identified four variations in the Partnership Model based on the licensure status of the plans with which Employers have contracted, each requiring a different degree of contractual relationship to achieve compliance with the Act:

- (1) Both FS Plan and SBH Plan are Knox-Keene licensees and independently contract with the Employer. Contracts with Employer and Partnership Contract identify primary coverage for AB 88 services as responsibility of SBH Plan with FS Plan providing secondary or supplemental coverage.
- (2) FS Plan is a Knox-Keene Licensee and SBH Plan is an administrative services organization or a third party administrator (“ASO/TPA”), which is an affiliate of a Knox -Keene Licensed SBH Plan. Contracts identify the primary coverage for AB 88 Services as the responsibility of the ASO/Knox-Keene Affiliate, with the FS Plan as the secondary or supplemental coverage. However, because the ASO is not a Knox-Keene Licensee, and presumably not itself subject to the jurisdiction of the Department, the Knox-Keene Affiliate must provide ensure that the ASO will meet the consumer protection requirements of the Knox-Keene Act in the rendering of the AB 88 services.<sup>3</sup>
- (3) FS Plan is a Knox-Keene licensee and SBH Plan is an ASO/TPA, which is not an affiliate of a Knox -Keene Licensed SBH Plan. Contracts identify the primary coverage for AB 88 Services as the responsibility of the ASO/TPA, with the FS Plan as the secondary or supplemental coverage. However, because the ASO/TPA is neither a Knox-Keene licensee or affiliate, the FS Plan must ensure that the ASO/TPA will meet the consumer protection requirements of the Act.
- (4) Both FS Plan and SBH Plan are ASOs/TPAs that are not affiliated with Knox Keene licensees. Each is in an independent contract with the Employer and obligated to provide AB 88 Services pursuant to that contract. Presumably, the ASO/TPA is outside the scope of the Act and not subject to the Department’s jurisdiction. However, please see Footnote No. 3 at Page 4.

Attached to this advisory are (1) a chart outlining the different contractual obligations that must be addressed in the Partnership Contract for the first three variations and (2) an attachment identifying specific instructions for FS and SBH Plans seeking to demonstrate compliance.

### **Two-Tiered Premium Model**

Another model for compliance that has been suggested by a FS Plan is a flexible funding or two-tiered premium arrangement (“Two-Tiered Premium Model”), pursuant to which the FS Plan would provide coverage of AB 88 Services in compliance with the Act, but the Employer would not pay the higher premium for an enrollee unless and until the enrollee utilized AB 88 Services through the FS Plan. The Employer would be free to contract with any other mental health provider entity it chooses to provide AB 88 Services.

Under this model, the FS Plan must ensure the confidentiality of medical information, including maintaining confidentiality of the fact that an enrollee sought mental health care services. The FS Plan should provide assurance that increasing the premium charged to an Employer upon an employee’s utilization of mental health services should not involve the release of any medical information to the employer, including the fact that an identifiable employee sought or obtained mental health services.

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<sup>3</sup> This Advisory does not address whether a particular ASO or TPA is operating as a health care service plan as defined in Section 1345(f) and requires licensure pursuant to Section 1349. All entities operating as health care service plans are required to obtain licensure to conduct business in California.

## **ATTACHMENT A**

### **DEMONSTRATING COMPLIANCE WITH THE ACT**

#### **A. Issues To Address**

In considering how to structure the Partnership, Two-Tiered Premium or other model for implementation of AB 88, health plans should address fully all requirements of the Act that apply in the context of delivering AB 88 Services. The Department may not approve any proposed arrangement if the totality of the arrangement does not demonstrate compliance with the Act. Significant provisions of the Act that health plans proposing such an arrangement should affirmatively address in the narrative description of the arrangement that should be included in Exhibit E-1 include:

1. Section 1363 and Rules 1300.63, 1300.63.1 and 1300.63.2 (disclosure forms and evidences of coverage);
2. Section 1365 and Rule 1300.65 (cancellation of coverage):
3. Section 1367(d) and Rule 1300.67.1 (continuity of care) and Rule 1300.67(a)(1) (coverage of medically necessary professional services);
4. Section 1367(e) and Rule 1300.67.2 (accessibility and availability of services);
5. Section 1367(h) and Rule 1300.67.4 (fair and reasonable contract terms and required disclosures in subscriber contracts;
6. Section 1368 and Rule 1300.68 (grievance process);
7. Section 1370 and Rule 1300.70 (quality assurance programs, including oversight of delegated programs);
8. Section 1374.72 (coverage of AB 88 Services); and
9. Rules 1300.67.13(a)(1) and (2)(coordination of benefits).

#### **B. Additional Issues of Concern**

1. Contingency Plan: A FS Plan should affirmatively demonstrate that it has developed and will implement a contingency plan to meet its statutory obligation to provide coverage of AB 88 Services if the SBH Plan fails to perform under its contract. Presumably the FS Plan will already have in place a traditional sub-contractual arrangement with one or more SBH Plans for the provision of AB 88 Services for its individual contracts and/or contracts with Employers that do not have a separate contract with an SBH Plan. It is conceivable that a FS Plan will not have any individual contracts and that all of its Employers will also have direct contracts with a SBH Plan. Nonetheless, all FS Plans should have a contingency plan by which they have either developed a direct mental health provider network, contracted for “back-up” from a SBH Plan that can step in

and provide the services under a traditional subcontracting arrangement or have developed some other such contingency plan. Under this arrangement, a FS Plan can include subscriber contract terms that provide for two tiers of premium, with termination of the SBH Plan contract triggering the higher tier of premium for coverage of all group subscribers under the particular contract and the implementation of the contingency plan.

2. Indemnity provisions: If the proposed contract between the health plans contain indemnity provisions, they should not operate to insulate the FS Plan from its obligations to oversee and monitor the parity of AB 88 Services provided pursuant to contract with an SBH Plan, and its independent obligation to provide services to the enrollee regardless of concurrent coverage, if the SBH Plan fails to perform under the contract.
3. Ensuring Parity: Parity issues that should be addressed specifically in the narrative provided in Exhibit E-1 include: co-payments, continuation coverage under Cal-COBRA and federal COBRA, and conversion rights. If the SBH Plan does not offer individual coverage, then enrollee conversion rights should be expressly addressed in the Partnership agreement.
4. Conversion to Individual Contracts: Issues of concern related to parity of benefits may arise when a FS Plan contract provides for conversion rights, and upon termination of his or her membership in a subscriber group an enrollee exercises those rights to convert to individual coverage. The Act does not require health plans to provide enrollees of group contracts with a right to convert to individual coverage. However, if a health plan does provide enrollees with conversion rights, pursuant to the AB 88 requirement for parity of terms and conditions, those conversion rights must extend to AB 88 Services. Therefore, FS Plans must identify these issues of concern with respect to delivery of AB 88 Services, and ensure parity for AB 88 Services extends to conversion rights. Accordingly, a FS Plan must ensure that either (1) the SBH Plan will provide coverage to enrollees who have converted to individual coverage and are no longer part of the Subscriber Group or (2) the FS Plan will assume responsibility for coverage of the individual AB 88 benefits.

## **FILING SPECIFICS**

The information and documents that should be filed with the Department to demonstrate compliance with AB 88 pursuant to a Partnership Contract or Two-Tiered Premium Contract are identified below.

### **A. Exhibit E**

The FS Plan should file a narrative describing the proposed arrangement and identifying the amendments to its license application. The narrative should fully address the elements of parity, continuity, accessibility, availability and quality of care. The identity and licensure status of the SBH Plan should be stated. There should be a description of the contingency plan to be implemented by the FS Plan if the SBH Plan does not perform under the contract or if the contract between the SBH Plan and the Employer is terminated. The FS Plan should affirm that it will ensure coverage of AB 88 Services in parity with the terms and conditions of its contract with the Employer. The narrative should address compliance with Rule 1300.67.13 with respect to coordination of benefits.

**B. Exhibit F**

A proposed Partnership Contract should be filed under Exhibit F-2-a and F-2-b. (A proposed Two-Tiered Premium subscriber contract should be filed under Exhibit P.) The contract should contain terms sufficient to:

1. Identify the FS Plan and the SBH Plan (including ASO/Knox-Keene Affiliate as applicable) as parties to the contract. Identify the purpose of the contract, including as applicable, coordination of benefits and ensuring parity;
2. Identify the employer/employer group that will receive the AB 88 Services as third party beneficiaries of the contract
3. Describe with specificity the coordination of benefits between the two plans, demonstrating that the SBH Plan is obligated to provide primary coverage of AB 88 Services;
4. Identify with specificity the services required to be performed by the SBH Plan;
5. Obligate the SBH Plan to provide the AB 88 Services on parity with the FS Plan's medical benefits;
6. Identify objective performance standards by which the FS Plan can evaluate performance;
7. Obligate the SBH Plan to not terminate the contract with the Employer unless it provides notice to the Group Subscriber and the FS Plan sufficient to (i) allow the Employer to find another SBH Plan that will coordinate AB 88 benefits with the FS Plan or (ii) allow the FS Plan to implement its contingency plan for the provision of AB 88 Services;
8. Authorize the FS Plan (or the Knox-Keene licensee affiliate of an ASO) to engage in oversight and monitoring of AB 88 Services provided by the SBH Plan, including authority to obtain information necessary for quality assurance oversight and monitoring, sufficient to demonstrate compliance with Rule 1300.70, including monitoring of the continuity, accessibility, availability and quality of AB 88 Services;
9. Give the FS Plan authority for the ultimate resolution of enrollee grievances raising parity issues; and
10. Identify the exchange of consideration that will make the contract legally enforceable;

**C. Exhibit J**

The Plan should file an amendment to Exhibit J describing how existing or new policies or procedures to be applied to oversight, to the extent applicable, of the SBH Plan or ASO.

**D. Exhibit P**

A proposed Two-Tiered Premium group subscriber contract should be filed under Exhibit P.

**E. Exhibits S, T, U**

The FS Plan evidence of coverage and disclosure form (“EOC”) should be amended to disclose coverage of AB 88 Services and refer enrollees to the SBH Plan to obtain those services. The SBH Plan EOC should be amended to disclose to enrollees the arrangement by which the AB 88 Services have been coordinated between the two plans and identify the SBH Plan as the primary coverage for those services. The SBH EOC should demonstrate compliance with the Act with respect to disclosure of coverage of AB 88 services, and grievance procedures related to those services, including those raising parity issues.

**F. Exhibit W**

The Knox-Keene licensee(s) seeking the Department’s approval must provide a description of the grievance process that will be applied under the proposed arrangement, demonstrating that disputed claims and grievances will be reviewed by appropriately licensed health care professionals competent to determine the clinical issues raised by the grievance or claim, or with respect to individuals with appropriate training to evaluate any parity issues that may arise. The plans must also identify the oversight that will be applied to grievances arising from AB 88 Services delivered by an entity that is not a Knox-Keene licensee, as applicable.

This Advisory is not intended to constitute a complete statement of everything a FS Plan must file to demonstrate compliance with AB 88 under employer carve-out circumstances. Additional information or documents may be requested by the Department depending upon the issues raised by a particular proposal.